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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1037

CASSIUS L. PEACOCK, JR.,
Petitioner,

vs.

RETAIL CREDIT COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion and judgment of the United States District Court for the Northern District of Georgia is correctly set forth in the Appendix (herein referred to as "A") to the Petition for Certiorari (herein called "Petition") (A 1-12); as is the affirming opinion and judgment of the Fifth Circuit Court of Appeals (A 13-14). The district court opinion is reported as *Peacock v. Retail Credit Company*, 302 F. Supp. 48 (N.D. Ga. 1969).

JURISDICTION

The statute under which Petitioner seeks to invoke the jurisdiction of this Court (28 U.S.C.A. § 1254) appears to be properly stated in the Petition.

The dates and times of the various proceedings in the courts below are properly stated in the Petition.

QUESTIONS PRESENTED

I. Are there any special and important reasons for the issuance of a Writ of Certiorari in this case?

II. Was there proper application of the law of the State of Georgia, the forum state, with respect to the statute of limitations, (A) that the applicable Georgia statute of limitations is one year; (B) that there was no exception to the Georgia statute of limitations caused by acts of fraudulent concealment; and (C) that the statute would not recommence upon "republication" by others?

III. Was the District Court, as affirmed by the Court of Appeals, correct in its analysis and application of the Georgia law of right of privacy?

IV. Did the District Court, as affirmed by the Court of Appeals, rule properly as a matter of law and within its discretion as to any further discovery?

STATUTES INVOLVED

The Georgia statutes applicable to this case are Georgia Code Sections 3-1004 and 3-807. Both of these statutes are properly quoted in the Petition. For convenience, they are set forth here as well.

> "3-1004. *Injuries to the person.*—Actions for injuries to the person shall be brought within

two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year."

"3-807. *Fraud.*—If the defendant, or those under whom he claims, shall have been guilty of a fraud by which the plaintiff shall have been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud."

STATEMENT OF THE CASE

In this Petition, the plaintiff in the district court, Cassius Peacock, Jr., is petitioning for a *writ of certiorari* and will be referred to as "Petitioner". The defendant in the district court was Retail Credit Company, referred to herein as "Respondent".

Petitioner brought suit against Respondent for alleged libelous statements made by Respondent in reports to certain surety bonding companies, banks and other financial institutions. Petitioner further contended the publication of the reports constituted an invasion of his right of privacy. (Record, pp. 1-7, 173.)

Discovery was had by Petitioner's taking of the deposition of W. Lee Burge, the President of Respondent (Record, pp. 214-310), by the propounding of Interrogatories by Petitioner, by the production of all documents relating to Petitioner within the year preceding the date of filing the Complaint, and by the production *in camera* of all other documents relating to Petitioner. (Record, pp. 9, 18, 32 and 58.)

The documents relating to Petitioner published by Respondent within one year before the date of filing the Complaint by Petitioner were in addition presented to

the district court by the affidavit of Edward D. DeVaney, Jr. This affidavit also reflected that Respondent in some cases, but not all, had contractual agreements with its customers that information contained in reports would be kept confidential by the customer. (Record, pp. 62-65.)

Based upon this affidavit, Respondent moved for summary judgment on the ground that no statement libelous of Petitioner was made within one year prior to the date of filing of the complaint, and that, therefore, the complaint was barred by the statute of limitations.

The district court granted the motion for summary judgment, applying the statute of limitations of the forum state of Georgia, holding that none of the exceptions to the statute recognized by Georgia were applicable, and holding that Petitioner had no cause of action with respect to violations of any right of privacy. The Court of Appeals affirmed.

ARGUMENT

I.

There are no special and important reasons for the issuance of a writ of certiorari in this case.

1. The controlling issue in this case is the application of the statute of limitations, and exceptions thereto, of the State of Georgia, to the complaints of Petitioner, and not some federal constitutional question (see subparagraph 2 below).

There can be no dispute that the law of the forum state, Georgia, controls as to the law of the statute of limitations and exceptions thereto. See *McElmoyle v. Cohen*, 38 U.S. 312 (1939); *Guaranty Trust Company of*

New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L. Ed. 2079 (1945); *Atropa Corp. v. Rossee*, 86 F.2d 118 (5th Cir. 1936); and *Blue v. Maico*, 217 F. Supp. 747 (N.D. Ga. 1963).

The district court, as affirmed by the Fifth Circuit, therefore construed the law of Georgia as it applies to statutes of limitation. The decisions of a district court sitting in the state whose law is the subject of particular litigation have been held by this Court to be entitled to great weight, as are the decisions of courts of appeal with respect to local law. See *Gardner v. State of New Jersey*, 329 U.S. 565, 67 S. Ct. 467, 91 L. Ed. 504 (1947); *Propper v. Clark*, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949); *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950); *General Box Co. v. United States*, 351 U.S. 159, 76 S. Ct. 728, 100 L. Ed. 1055 (1956); *Sims v. United States*, 359 U.S. 108, 79 S. Ct. 641, 3 L. Ed. 2d 667 (1959); and *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967).

The cases and statutes of Georgia applicable to the statute of limitations were properly applied by the district court as will be more fully shown in Part II hereinbelow. There is no reason that the state law of Georgia as applied by the district court, and as affirmed by the Fifth Circuit, should be reviewed by this Court.

The same considerations apply to the opinion and judgment of the district court, as affirmed by the Fifth Circuit, with respect to the state law of right of privacy.

2. The Petitioner contends that a federal constitutional question is involved without precisely delineating the portion of the Constitution in concern, apparently

relying on the case *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), to substantiate this position. However, this contention is misplaced. Whatever effect *Griswold* has in protecting the relationship of marriage or other individual rights from intrusion by government, it creates no private tort action for businessmen such as Petitioner. Questions relating to the general right of privacy of a person are left to the law of the individual states. In *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 576 (1967), Mr. Justice Stewart delivered the opinion of the Court, stating therein:

> ". . . the Fourth Amendment cannot be translated into a general constitutional 'right to privacy'. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states." 389 U.S. at 350-51; 88 S. Ct. at 510-11.

See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

Though the decision of the district court applying the statute of limitations would have been sufficient to terminate this litigation as to both the elements relating to libel and those relating to asserted violations of a right of privacy, the district court, in addition, correctly decided the law of the State of Georgia pertaining to actions for violations of a right of privacy in general.

Again, a pure question of state law is involved, and as will be shown in Part III hereinbelow, was correctly decided by the district court and affirmed by the Fifth Circuit.

3. There is no issue of any widespread importance in this case, despite the bold assertions of Petitioner to the contrary. If any commercial reporting agency publishes false information about a person, remedies are available to that person. The ancient doctrines of the libel laws as established in the various states, and the more recently evolved state common law, or statutory principles of "right of privacy", where applicable, provide ample means of relief to such a person.[1]

It is obvious that no one besides Petitioner is particularly concerned with whether or not Petitioner failed to bring suit in time. That the Georgia statute of limitations forecloses Petitioner is a matter of Petitioner's own creation, since he as a Florida resident chose the forum of a district court sitting in Georgia for his suit, even though Respondent would have been subject to suit in Florida, having offices in that state. (Record, p. 222.) That Petitioner was unwilling to "wash his dirty linen" in his home state was his own decision. Obviously, what Petitioner is truly concerned with is an opportunity to try to recover some sum of money from Respondent in a state-law court action. The district court, as affirmed

[1]In this respect, it should be noted that Congress has considered the matter of credit reporting in general and has enacted legislation designed in part to aid persons who may have legitimate complaints. An Amendment to the Consumer Credit Protection Act, adding thereto a new Title VI dealing with consumer credit reporting, has been enacted by Congress and was signed by the President on October 26, 1970 (Fair Credit Reporting Act, Public Law 91-508; 84 Stat. 1114). It would appear, therefore, that "public opinion", to the extent it existed, has been served in the appropriate forum for such considerations—the Congress of the United States.

by the Fifth Circuit, correctly resisted efforts to distort the law of Georgia for this purpose. State law, as will be shown hereinbelow, clearly foreclosed suit by Petitioner both in libel and in "right of privacy". The district court's decision, as affirmed by the Fifth Circuit, was correct in its entirety.

Respondent feels it clear that no reason for issuance of a writ exists in this case. However, to counter assertions by Petitioner that the district court and the court of appeals incorrectly decided the state law of Georgia, attention is given in Parts II and III of this Brief to the proper application of state law. Finally, in Part IV, consideration is given to the secondary points raised by Petitioner with respect to discovery.

II.

The district court, as affirmed by the court of appeals, properly applied the law of the State of Georgia, the forum state, with respect to the law relating to the statute of limitations, and Petitioner is barred by that statute with respect to all matters he asserts as causes of action.

A. The Georgia statute of limitations applicable to this case was properly held to be one year.

As has been shown above, the proper statute of limitations applicable to this case is that of the State of Georgia, the forum state.

The statutory law of Georgia provides a one-year statute of limitations with respect to injuries to reputation. Georgia Code § 3-1004 provides:

> "*Injuries to the person.*—Actions for injuries to the person shall be brought within two years after the right of action accrues, except for in-

> juries to the reputation, which shall be brought within one year."

Georgia law further provides that a cause of action accrues and the statute of limitation begins to run when an act constituting an invasion of a plaintiff's rights is actually committed and a legal injury has resulted. See *Barrett v. Jackson*, 44 Ga. App. 611, 162 S.E. 308 (1931); *Silvertooth v. Shallenberger*, 49 Ga. App. 133, 174 S.E. 365 (1934); *Irvin v. Bentley*, 18 Ga. App. 662, 90 S.E. 359 (1916); and *Wellston Co. v. Sam N. Hodges, Jr. & Co.*, 114 Ga. App. 424, 151 S.E. 2d 481 (1966).

Georgia law provides that an action arising from a defamatory statement is one for injury for reputation and must be brought within one year from the date on which the cause of action accrues. *Bagwell v. Rice & Hutchins Atlanta Co.*, 38 Ga. App. 87, 143 S.E. 125 (1928).

Moreover, whether the complaint is for libel or for invasion of the right of privacy by public disclosure of embarrassing private facts or holding forth the plaintiff in a false light, the limitation of one year controls because, as stated in *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E. 2d 496 (1966), the leading Georgia case with respect to right of privacy, invasions such as these cause injury to reputation:

> "The interest protected [by an action for invasion of the right of privacy by public disclosure of embarrassing private facts] is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation into the field of publications that do not fall within the narrow limits of the old torts, with the elimina-

> tion of the defense of truth.' Prosser, supra, at 398." (bracketed phrase added) 114 Ga. App. at 372, 151 S.E. 2d at 501.
>
> "The false light cases obviously differ from those of intrusion, or disclosure of private facts. The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation. There is a resemblance to disclosure; but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention.' Prosser, supra, at 400." 114 Ga. App. at 375, 151 S.E. 2d at 502.

Therefore, the one-year statute of limitations with respect to injuries to reputations, as enunciated in Ga. Code § 3-1004 above, is applicable to the "Right of privacy" contentions of Petitioner.

The district court was correct in holding causes of action for libel barred by the statute of limitations. Indeed, Petitioner's entire case, including any asserted cause based on a violation of a right of privacy, was so barred.

B. The exception tolling the Georgia statute of limitations when there are acts of fraudulent concealment was properly held to be inapplicable.

The district court ruled that fraudulent concealment necessary to toll the Georgia statute of limitations did not exist in this case. The statutory basis for an exception to the statute of limitations in the event of fraudulent concealment is set forth in Georgia Code § 3-807 quoted in the above section of this Brief entitled "Statutes Involved".

As was stated in *Printup v. Alexander & Wright*, 69 Ga. 553, 556 (1882), exceptions to the statute of limita-

tions: ". . . must receive a strict construction, for they are exceptions to the avowed policy of the law". See also *Anderson v. Gailey*, 33 F. 2d 589 (N.D. Ga. 1929).

The facts relating to any concealment appear in the Affidavit of Petitioner of September 12, 1968 (Record, p. 159), which in essence is a statement by Peacock merely that he did not know about any alleged libel; and in the Affidavit of DeVaney which sets forth the contract signed by some, but not all, customers of Respondent to whom reports may have been furnished with respect to Petitioner, which contract requires reports to be kept confidential. (Record, pp. 64, 71).

Georgia law is well established that mere ignorance of a cause of action is not sufficient to create an exception to the statute of limitations. See *Davis v. Boyett*, 120 Ga. 646, 48 S.E. 185 (1904); and *Wellston Co. v. Sam N. Hodges, Jr. & Co.*, 114 Ga. App. 424, 151 S.E. 2d 481 (1966).

Georgia law is clear that in order for the exception to arise, concealment must be "fraudulent concealment", and that the requisite fraud must be fraud involving moral turpitude. See *Downs v. Harris*, 75 Ga. 834 (1885); *Anderson v. Gailey*, 33 F. 2d 589 (N.D. Ga. 1929); *Nicolson v. Citizens & Southern National Bank*, 50 F. Supp. 92 (S.D. Ga. 1943); *Irvin v. Bentley*, 18 Ga. App. 662, 90 S.E. 359 (1916); *Ponder v. Barrett*, 46 Ga. App. 757, 169 S.E. 257 (1933); *Carnes v. Bank of Jonesboro*, 58 Ga. App. 193, 198 S.E. 338 (1938); aff'd, 187 Ga. 795, 2 S.E. 2d 495 (1939); *Middleton v. Pruden*, 57 Ga. App. 555, 196 S.E. 259 (1938); *Barrett v. Jackson*, 44 Ga. App. 611, 162 S.E. 308 (1931); and *Clinton v. State Farm*

Mutual Automobile Ins. Co., 110 Ga. App. 417, 138 S.E. 2d 687 (1964).

For example, in *Ponder v. Barrett*, *supra*, the court stated the rule:

> "Mere ignorance of the facts constituting a cause of action does not prevent the running of the statute of limitations. *Barrett v. Jackson*, 44 Ga. App. 611 (162 S.E. 308). The fraud which, under the provisions of Section 4380 of the Civil Code (1910), will relieve the bar of the statute of limitations must be of that character which involves moral turpitude, and must have the effect of debarring or deterring the plaintiff from his action. *Anderson v. Foster*, 112 Ga. 270 (37 S.E. 426)" 46 Ga. App. at 757 (2).

Particularly pertinent is the case of *Irvin v. Bentley*, *supra*, which applies these principles to an action for injury to reputation, the injury being an alleged libelous publication. In *Irvin*, the facts were that the defendant, as an attorney at law, had collected a certain sum from the plaintiff, a merchant, in part payment of certain claims held for collection and then, after falsely advising the creditors that their claims had been settled for 66⅔ cents on the dollar, collected the full balance from plaintiff. The plaintiff contended that his credit had been damaged by the false report made by the defendant, and he further contends that the defendant had "willfully, fraudulently, and artfully" concealed from the plaintiff the fact that he had falsely so advised creditors of the plaintiff for the purpose of keeping the plaintiff in ignorance of his cause of action against the defendant.

In spite of these factual assertions of active concealment of obvious misconduct by the attorney, the Court

of Appeals of Georgia held, without dissent, that the cause of action was barred by the statute of limitations and stated as follows:

> "This is a case affecting the reputation of the plaintiff, and, the time of the alleged libelous communication being on or about March 8, 1914, and the writ being filed on September 30, 1915, the action is barred.
>
> "In cases of this character *the right of action accrues to the plaintiff on the doing of the act by which the reputation is injured, and the fact that the plaintiff was ignorant of the act does not toll the statute. 'Mere ignorance of the facts constituting a cause of action does not prevent the running of the statute of limitations.' Davis v. Boyett*, 120 Ga. 649 (48 S.E. 185, 66 L.R.A. 258, 102 Am. St. R. 118, 1 Ann. Cas. 386); 25 Cyc. 432." (Emphasis added)

The fact that a defendant or its officers and employees, might have been in exclusive control of the facts constituting the cause of action, and did not reveal these facts to plaintiff, would not alter the result. See *Anderson v. Gailey, supra*, where it was held that where certain directors of a bank concealed certain bad loans by listing them on the books as good, there was not such fraud as would toll the statute of limitations, even though the directors were in exclusive control of the facts that would give rise to a cause of action; *Morris v. Johnstone*, 172 Ga. 598, 158 S.E. 308 (1931), where it was held that concealment of itself is not a fraud, and certainly not such fraud as will toll the statute of limitations unless there is a duty upon the defendant to make disclosure to the plaintiff; *Stephens v. Walker*, 193 Ga. 330, 18 S.E. 2d 537 (1942), where it was held that mere failure to give notice of a cause of action will not constitute the neces-

sary fraud, unless a fiduciary relation exists which renders it the duty of the one possessing the facts as to the cause of action to reveal them; and *Brinsfield v. Robbins*, 183 Ga. 258, 188 S.E. 7 (1936), to the same effect.

There can be no question that the district court, in the light of these binding precedents in the courts of the State of Georgia, held properly that fraudulent concealment necessary to give rise to an exception to the Georgia statute of limitations was not present in this case.

C. The district court, as affirmed by the court of appeals, held properly that the Georgia statute of limitations would not begin to run again upon a "republication" by others of any libelous information with respect to Petitioner.

The facts in this case show that no documents relating to Petitioner published by Respondent within one year preceding the date of filing the Complaint contained libelous matter. (Record, pp. 63-71) Petitioner theorizes that the mere retention in its files of libelous material by Respondent, or the reexamination of such material from time to time by employees of Respondent, or the actual further publication by the third-party clients of Respondent create a new cause of action against Respondent on which the statute of limitations would begin again from the date of such reexamination or further publication.

The law of Georgia is clear that there is not a republication of a libel with each rereading by the original recipient, and that the reading or rereading of a libel by the agents, employees or business associates of the Respondent, or its customers, is not a publication of the libel.

In *Beck v. Oden*, 64 Ga. App. 407, 13 S.E. 2d 468 (1941), the precise issue as to publication in such circumstances was considered. The court held there was no publication. The court quoted 18 A.L.R. 778, as follows:

> "The more liberal rule, and the one which seemingly has the support of the weight of modern authority, is that where the communication is made to a servant or business associate in the ordinary and natural course of business, there is no actionable libel." (64 Ga. App. at 412, 13 S.E. 2d at 471).

In *King v. Schaeffer*, 115 Ga. App. 344, 154 S.E. 2d 819 (1967), a motion for summary judgment to one count of a complaint was sustained, the Court of Appeals of Georgia, in affirming, holding that there was no publication where the communication was within the corporation framework and was made to other agents of the corporation.

The leading case in Georgia is *Central of Georgia Ry. Co. v. Jones*, 18 Ga. App. 414, 89 S.E. 429 (1916), in which it was held that communication by an agent of a corporation to another agent and a stenographer employed by the corporation was not a publication. See also *Walter v. Davidson*, 214 Ga. 187, 104 S.E. 2d 113 (1958).

Petitioner has cited a dictum in *Howe v. Bradstreet Co.*, 135 Ga. 564, 69 S.E. 1082 (1911), in contending that a second publication of a libel by a third party might be such as to hold the first publisher liable in an independent action commencing upon the date of publication by the third party, provided the publication by a third party was the natural consequence of the original publication.

In *Howe*, however, the facts involved were very similar to the case Petitioner has attempted to assert here, in

that the alleged libelous material was furnished by a customer of the defendant Bradstreet Co. to its salesman. In the face of these facts, the court in *Howe* held that the Bradstreet Co. was not liable for the republication by its customer.

The only cases Petitioner has been able to produce on this issue are the *Howe* case, which has been discussed above; *Riley v. Dun & Bradstreet*, 172 F. 2d 303 (6th Cir. 1949); and *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 98 S.E. 2d 687 (1957).

An inspection of *Riley* (a case from Tennessee) shows an actual successive publication by the same publisher of the same libel—that is to say, the defendant in *Riley* published an alleged libel and some months later republished the same alleged libel. The court measured the statute of limitations from the date of the last libelous publication, even if it was a repeat publication. In the case before this Court, however, the affidavit of DeVaney (Record, pp. 62-71) showed the only reports made by Respondent which contained information relating to Petitioner within the year, and, therefore, shows the last publication made by Respondent. Neither the last publication, nor any of the others made within the year, were libelous. The distinction is that in *Riley*, there were successive publications of the same libelous material by the same party, one of which libelous publications was within the statutory period; while in the case before this Court, the material published within the period of the statute was not libelous, the Petitioner attempting to rely on some "republication" by a third person as a toe hold to keep his case in court. *Riley* is, therefore, not apropos.

The *Weaver* case is a split decision from Virginia. It is not controlling on a court of Georgia, and indeed is

incorrect. The correct statement of the law appears in the dissenting opinion in *Weaver*, where it is stated:

> "I cannot assent to the proposition that the statute of limitation on the alleged libel in this case runs not from the date of its publication but from the date of the alleged republication. It seems to me unwise to establish the principle that after the publication of a libelous letter a new and independent cause of action arises against its author each time its recipient shows it to some third person if, in the opinion of a jury, the recipient's act was a natural and probable consequence of the original wrong, or was actually or presumptively authorized by the author. On that basis suits may be brought, I suppose, just as long as the author lives and the recipient is able to exhibit the letter.
>
> "I do not understand the authorities cited in the court's opinion to say that every such republication establishes a new date from which the limitation begins to run. They simply say that it is generally agreed that the author of a defamation who publishes it is liable for the injurious consequences of a republication thereof by the person to whom it is addressed if such republication is authorized or is the natural and probable result of the original publication. 33 Am. Jr., Libel and Slander, § 197, p. 185. or, as expressed in 53 C.J.S., Libel and Slander, § 83, p. 136 there is in such event 'a separate cause of action against *the person responsible* for such new publication.' (Emphasis added) That is far from saying that a new cause of action, subject to a new period of limitation, arises against the original author of the libel in every instance that the libel is published afresh by the person who first received it." 98 S.E. 2d 692.

Even if the *Weaver* principle were sound, it would not apply to this case, since, as stated above, a republication by a customer of Respondent could not be a natural consequence of any publication by Respondent in view of the fact that Respondent, as a matter of policy and contract, requires its customers to keep confidential and not to republish or otherwise disclose reports received from the Respondent. It is clear that a publication or republication by a third-party customer of Respondent could not (even if such occurred) be said to have actually or presumptively been authorized, permitted, or contemplated by Respondent, or to have been a natural or probable consequence of the original publication. The distinction from *Weaver* is obvious.

III.

The district court, as affirmed by the court of appeals, properly decided the law of Georgia with respect to the common law right of privacy.

As has been demonstrated earlier in this Brief, even if a violation of a right of privacy were shown here, such would be forever barred by the one-year statute of limitations which applies in Georgia with respect to injuries to reputation.

The discussion of the Petitioner about right of privacy as the law exists in Georgia mentions only in passing the most thorough and most analytical treatment of that law. This treatment appears in the case relied upon by the District Court in its opinion, *Cabaniss v. Hipsley*, 114 Ga. App. 367, 151 S.E. 2d 496 (1966). The *Cabaniss* case, and the District Court here, recognize the leading Georgia case of *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101 (1905). This case, of

course, is the "grandfather" for much of the later development of the law of the right of privacy. Since the date of *Pavesich*, its progeny have been many, and as is appropriate and usual with the development of a common law doctrine, address themselves to the task of applying the *Pavesich* principle to a multitude of varying fact situations. The Court of Appeals of Georgia, in *Cabaniss*, thoroughly analyzed all Georgia cases which involved the right of privacy, weaving them into a cohesive whole. The Court of Appeals of Georgia found the Georgia cases to fall into four categories, these being: (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs, 114 Ga. App. at p. 371; 151 S.E. 2d at 500), (2) public disclosure of embarrassing private facts about the plaintiff (Id. at p. 372); 501), (3) publicity which places the plaintiff in a false light in the public eye (Id. at p. 375; 502), and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness (Id. at p. 379; 503).

This is exactly what the district court stated in its opinion. (A6).

The Petitioner has contended that the publications he has alleged violate the "false light" doctrine, are unwarranted intrusions into Petitioner's private affairs, and constitute unwarranted public disclosure of embarrassing private facts about the Petitioner. (Record, pp. 173-174).

As analyzed by the district court, and affirmed by the Court of Appeals, there can be no violation of Petitioner's right of privacy by intrusion into his private affairs because the Georgia cases require such intrusion to be physical, analogous to a trespass.

In *Cabaniss*, at page 371 (151 S.E. 2d at 500), the Court discusses this theory of the action, analyzes the elements, and cites substantial authority in support of its conclusion that the plaintiff in *Cabaniss* was not entitled to proceed under this theory absent a physical intrusion. Nothing of this sort occurred in the case before this Court.

So far as the theories of "holding forth in a false light" or "public disclosure of embarrassing private facts" are concerned, the district court again properly applied the doctrines of *Cabaniss*, holding that there was no "public disclosure" of anything about the Petitioner. The district court very properly pointed out that any information about Petitioner was furnished only to clients of Respondent, that the information so furnished was required by contract to be held confidential, and that not only was the information not given to the public, it was not even available to Petitioner.

It should be noted that there is a very pertinent Georgia case on these points. In *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 213 Ga. 682, 100 S.E. 2d 881 (1957), it was held:

> "3. Whether a letter written by a creditor to an employer notifying him that his employee is indebted to the creditor and seeking the employer's aid in the collection of the debt constitutes a violation of the right of privacy of the employee, is a question of first impression in this State. Courts of other jurisdictions in dealing with the question have generally held that such does not give a cause of action for a violation of the right of privacy, their reasoning being that in giving this information to an employer, it was not giving to the general public

> information concerning a private matter in which it had or could have, no legitimate interest, since an employer has a natural and proper interest in the debts of his employee." 213 Ga. at 683-84.

Other cases pertinent to this point are *Haggard v. Shaw*, 100 Ga. App. 813, 112 S.E. 2d 286 (1959); and *Davis v. General Finance & Thrift Corp.*, 80 Ga. App. 708, 57 S.E. 2d 225 (1950).

Certainly, those who contemplated substantial commercial transactions with Petitioner (Record, p. 64) had as natural and proper an interest in any information furnished them by Respondent about Petitioner as does an employer in similar information about his employee.

The district court, therefore, in its treatment of the Georgia state law relating to the right of privacy, not only reached a decision ascertaining what logic the Georgia courts would apply, but also applied controlling authority from the Georgia state courts in making its findings.

IV.

There is no merit to Petitioner's contentions about discovery, be it "equitable" or otherwise, and the district court, as affirmed by the court of appeals, ruled properly as a matter of law and within its discretion as to further discovery.

The district court did not err when it would not permit Petitioner further discovery, whether that discovery be viewed as an equitable bill for discovery, as Petitioner urges, or the usual subpoenas, interrogatories, motions for production of documents, and notices of depositions that Petitioner actually utilized in this case.

The district court found that Respondent had committed no libel within the period of the statute of limitations and held that Petitioner failed to show a claim for invasion of privacy. This left Petitioner's request for discovery before the court with no case or controversy between the parties and no jurisdictional amount. Had Petitioner initiated an action for such discovery alone, there would have been no jurisdiction in the federal court due to the absence of the requisite amount and the absence of a controversy between the parties. It is most doubtful that such an action for pure or strict discovery lies in the federal court, especially since the advent of the Federal Rules of Civil Procedure, but, even if such an action could lie, it would constitute a request for extraordinary relief addressed to the sound discretion and well within the grace of the equitable side of the court. Such an action could never lie in the federal court without a basis for federal jurisdiction. See: *Amand v. Pennsylvania R.R. Co.*, 17 F.R.D. 290, 296-97 (D. N.J. 1955).

Respondent submits that today discovery is exclusively controlled by the Federal Rules of Civil Procedure which should not be eroded by ancient equitable writs as Petitioner proposes. Furthermore, today, the right of "discovery" does not exist independent of an existing action. Thus, in *Leshem v. Continental American Life Ins. Co.*, 219 F. Supp. 504 (S.D. N.Y. 1963), the court refused to allow discovery, the sole use of which would only be in a different action in a different court; and, in *Application of Royal Bank of Canada*, 33 F.R.D. 296 (S.D. N.Y. 1963), the court held at page 303 that the plaintiff

"Should not be permitted to use the process of

> the court prior to the commencement of an action to examine a prospective witness in order that it may be able to decide whether it will be on firm ground in finally bringing the processes of the court into play. The *Federal Rules of Civil Procedure may not be used as a convenient means of determining whether the institution of litigation will be worthwhile.*" (Emphasis supplied)

It is exactly such a misuse of federal discovery which Petitioner has attempted and which the district court has denied. Clearly, Petitioner, who claims he has no idea whether a tort has been committed against him or not, is demanding judicial assistance in invading Respondent's files to determine whether instituting litigation against some third party would be worthwhile. This is a far cry from the requisite showing that Petitioner presently has a cause of action for an actionable tort committed against him but needs information from Respondent as to whom to sue. The district court carefully refrained from ruling against a request of that sort and indicated that should such a situation arise and be validly presented to the court (assuming there was federal jurisdiction) it would be considered at that time. This exercise of discretion by the district court was clearly proper.

Thus, in summary, a Petitioner whose alleged actions are barred and otherwise fail at the outset, and who has no independent basis to support federal jurisdiction over Respondent, and does not show a cause of action against third parties, has no absolute right of access to Respondent's files to search for a possible cause of action. A court which, in its sound discretion, refuses to allow such relief does not commit error.

Conclusion

The district court, as affirmed by the Fifth Circuit, decided controlling question of state law, as may be seen in the foregoing discussion. That being so, there is no issue of such "special" importance as to require this Court's attention and the petition for writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, Allen Post, Attorney for Respondent, do hereby certify that I have served the required number of copies of the foregoing Brief for Respondent in Opposition to Petition for Writ of Certiorari upon C. James Jessee and Martin David Merritt, Shoob, McLain & Jessee, 3242 First National Bank Tower, Atlanta, Georgia 30303, Attorneys for Petitioner Cassius L. Peacock, Jr., by depositing the same in the United States Mail, first class postage prepaid, in an envelope addressed to them.

This . day of December, 1970.

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